NO. 91-562

IN THE

Supreme Court of the United States

OCTOBER TERM
1990

HAROLD C. BANKS
Petitioner

v.

CITY OF SAN JOSE, et al.
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES SUPREME COURT
FOR THE NINTH CIRCUIT

HAROLD C. BANKS
Counsel for Petitioner
In propria persona

ADDRESS:

10 FLAUM COURT
SACRAMENTO, CA 95823
916/393-2201

QUESTIONS PRESENTED

FEDERAL RULES

1. Does the appellate Court's endorsement of the lower court's refusal to address itself to a responsible implementation of the mandates of the Federal Rules entitle petitioner to be placed under the protection of this Court's power of supervision?

2. Does the pattern and practice of the courts' disregard for minority petitioner's right to impartial implementation of law to secure equal protection and due process, by both lower courts, constitute a conflict with the mandates of statutory and Constitutional protection as this Court has held and given, respectively?

EVIDENCE

3. Does the Ninth Circuit's refusal to recite bases (authorities) for its rejection of petitioner's evidence (filed in support of his Complaint and opposition to respondents' motion for summary judgment, where several material issues require jury determination), injure and deny petitioner due process?

QUESTIONS PRESENTED - cont'd

4. Does this refusal to address petitioner's reliance on this Court's holdings, entitle petitioner to this Court's protection where the Ninth Circuit panel, without recitals, found the record too "unclear" to rule for Black plaintiff, refused to remand to make clear what is "unclear," and instead, ruled in favor of white defendants dismissing plaintiff's cause of action without jury trial demanded by petitioner?

LIST OF THE PARTIES

The parties are:

Harold C. Banks, Petitioner

City of San Jose, et al., Respondents

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD C. BANKS
PETITIONER

v.

CITY OF SAN JOSE, et al.,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

to the

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITIONER, Harold C. Banks, respectfully prays that a Writ of Certiorari issue to review the Judgment Memorandum of the U.S. Court of Appeals for the Ninth Circuit, to overturn the lower court's issuing of Summary Judgment in favor of Appellees and against appellant.,

OPINIONS BELOW

If the U.S. Court of Appeals' Memorandum, filed, February 21, 1991, is construed to be an "Opinion,"

then it appears in Appendix A-2, infra. The unpublished written Judgment & Order of the district Court appears at A-7, infra.

JURISDICTION

The Court of Appeals' Memorandum in this matter was tried, February 21, 1991. A timely petition for rehearing was filed, April 12, 1991. The appellate court denied appellant's petition, April 25, 1991, as set forth in A-1. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The statutory provisions primarily at issue here are initially, F.R.C.P., Rules 12(a); 4(c)(2)(C)(ii); 55(a), 55(b)(1), and 55(b)(2); petitioner's Fourteenth, Seventh, and Fifth Amendment guaranteed rights to due process and equal protection under the law.

STATEMENT OF THE CASE

The U.S. district court, N. District of California, had jurisdiction, pursuant to 42 U.S.C. § 2000e et seq.; §§ 1981 through 1986, 1988; and 28 U.S.C. §§ 1337, 1243(4).

Plaintiff, Harold C. Banks (Banks) filed his complaint, April 26, 1988, in the San Jose court, pursuant to statutes cited in previous paragraph, charging defendants, San Jose Airport Police (SJAP) of the City of San Jose (CSJ) with racial discrimination in employment practices, and denial of his statutory civil rights to re-employment subsequent to constructive discharge from his previous employer, City of Palo Alto.

April 26, 1988, Banks had process served upon CSJ-SJAP, a complaint, executed summons with 20-day demand, two exectuted copies of Form 18-A, dated April 26, 1988, and a return, self-addressed stamped envelope. Defendants received process, April 27, 1988. Twenty days elapsed and SJAP failed to file an answer, or to motion for extension of time to file a late answer. Banks reserved CJS-SJAP, June 3, 1989, by state process, required by the federal Rule 4(c)(2)(C)(ii), when defendants failed to return Form 18-A. Plaintiff for the third time, served defendants by process server, August 9, 1988. All this evidence is filed into the record.

August 29, 1988, Banks filed Request for Entry of Default. When the Clerk failed to acknowledge this pleading, on October 4, 1988, Banks filed a motion for entry of default to the district court. August 29, 1988, defendants filed their motion to dismiss/motion for summary judgment. Seven-and-a-half months later, the district court's, "Second Proposed Order," dated, November 7, 1988, without requiring defendants to show cause why they failed to acknowledge three services of process, and failed to motion for an extion of time required by the Federal Rules, ordered defendants to file an answer within 20 days.

The district court gave no reasons for its breach of the mandates of the Federal Rules regarding timely answer to plaintiff's lawfully served Complaint, pursuant to the federal rules in a federal court, on a federal cause of action. Judge Ingram's 4/18/89 Order is a fabrication.*

More embarassing to the district court's partiality in its preferential treatment of white defendants, is defendants' own admission, that "... proper service is deemed to have been effective...."

*Appendix, A-11

Defendants' admission, filed into the record, and not in dispute between the parties, that plaintiff had in fact served defendants pursuant to the federal rule, and the record proves that defendants did not comport with the demands of the law, the district court selected to manoeuvre a victory for defendants who were in default for failure to answer complaint by "proper service."

July 24, 1989, the district court held hearings on the parties' motions and cross motions for summary judgment, while plaintiff's motion for entry of default was ignored by the district court. Instead, July 27, 1989, the Ingram court issued his order-judgment granting defendants' motion for summary judgment. (A-8)

August 9, 1989, Banks filed his motion for a new trial, or in the alternative, motion to alter or amend the court judgment, basing his motion on the grounds that defendants' motion claims that Banks had failed the medical examination were pretextual to deny him employment because he, Banks, had filed a Title VII action against his former employer, City of Palo Alto, police department.

Banks filed evidence into this record proving CSJ-SJAP denied him employment, not because he "failed the medical examination," but because "of the other trouble at Palo Alto." (A-19)

October 11, 1989, the district court issued its Order denying Banks' motion for rehearing, and in which Order cited Banks as "unqualified because he failed to pass his medical examination." The record proves that statement false.

PETITIONER'S APPEAL TO NINTH CIRCUIT

November 22, 1989, petitioner filed his Notice of Appeal. Banks appellant's Brief argued the following Questions on Appeal: "Federal Rules of Civil Procedure (FRCP) & UNITED STATES SUPREME COURT RULINGS."

"Whether, or not, the district court Order & Judgment filed, July 27, 1989, violated FRCP, Rules 12(a), 4(c)(2)(C)(ii), 55(a), 55(b)(1), 55(b)(2), thereby denying plaintiff Banks, the statutory protections expressed therein, and the Constitutional protections guaranteed by the Fifth and Fourteenth Amendments?"

And, second, "Whether or not, the district court

exceeded its judicial power and authority by ignoring the Rules' requirements to show that after viewing all the evidence (pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits required before a motion for summary judgment can lie), 'in a light most favorable to the party opposing the motion,'..., and from these statutory requirements conclude that no genuine issue as to ANY material fact exists; and, where such evidence presented by opposing parties does conflict, those triable issues shall be presented to a jury?"

Appellant Banks presented that the district court had erred by a) failing to abide by the mandates of the FRCP, enumerated above; failing to answer-adjudicate plaintiff's motions; b) failing to give credence to the truths revealed in plaintiff's evidence which categorically refuted all defendants' unproven claims-assertions; c) by permitting defendants to prevail on mere oral-written assertions without requiring defendants to file evidence to counter plaintiff's probative documented evidence, filed under penalty of perjury.

February 21, 1991, the Ninth Circuit issued its MEMORANDUM, wherein the panel judges refused to address themselves to responsible, impartial and full review of the mandates of the federal laws involved, the stare decisis precedents issued by this Court which are binding on all inferior courts, and wherein panel judges' findings are contemptuous of petitioner's basic rights to fundamental substantive and procedural due process, guaranteed by the Constitution of the United States.

April 12, 1991, petitioner filed his petition for rehearing, wherein petitioner specifically directed the appellate court's attention to numerous legal facts which the district court ignored and which appended evidence supported, in favor of plaintiff. (A-14)

April 25, 1991, the panel issued its ORDER, denying Banks' petition for rehearing; (A-1, A-2). Circuit panel Judges Wright, Goodwin and Skopil, despite their own acknowledgement that the "records" were "unclear," made rulings and findings for white defendants.

Appellant Banks herewith files this Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to correct the obvious violations of law against petitioner first by respondents, and then to correct the lower courts' total disregard for the probative, documented evidence proving respondents' guilt, and the courts' refusal to respect the rights of petitioner, and to address themselves to impartial implementation of the mandates of the Federal Rules of Civil Procedure, and the mandates of the stare decisis holdings of this Court which are binding on inferior courts.

The Orders and Memorandum filed from the district and appellate courts, respectively, are not only opaque in their relevance to petitioner's pleadings, and his appellant's brief, but their superficiality and opaqueness self-classifies them out of the arena of scholarly discourse.

The lower courts' total disregard for serious analysis of the probative, filed evidence of

defendants' violations of law, and the appellate court's refusal not only to respect the guaranteed rights of minority appellant, manifesting such a contemptuous recount and dismissal of the serious violations or petitioner's rights, calls not only for intercession by this Court, but for its protection of the rights of petitioner.

FEDERAL RULES OF CIVIL PROCEDURE ABROGATED BY THE DISTRICT COURT.

The lower court refused to implement the mandates of the federal rules regarding timely answer to effective service of process by plaintiff on defendants: Rules 12(a); 4 (c)(2)(C)(ii). Where defendants admit they were served "effectively," i.e., by federal service of process, the district court has no legal grounds to deny plaintiff default judgment. Nor does the district court have jurisdiction to refuse to adjudicate plaintiff's motion for entry of default judgment to provide defendants an avenue to escape the demands of the federal rules governing timely answer: Rule 12(a), and the executed Summons. The federal law is clear: 20 (twenty) days.

Permitting motions, lawfully filed, to lie fallow to provide party, to which the court is partial, to prevail, cannot be permitted to lie. This Court has ruled in Thomson v. Wooster, 114 U.S. 104 (1884), that the doctrine of nil dicit prevails; at 110-111. The entry of default judgment is well-known in this circuit as it applies to white parties against white parties; In re Consolidated Pretrial Proceedings in Air West, 436 F.Supp. 1281, 1285-86 (N.D. Cal., SF 1977); LeMaster v. City of Winnemucca, 113 FRD 37 (D.C. Nev. 1986). In Benny v. Pipes, 799 F.2d 489 (CA9 1986), where panel Judges Pregerson, Poole and Noonan held that failure to make a timely answer constituted a "default," the Circuit court is without hesitation on the clear meaning of the Federal Rule 55, regarding failure to answer a complaint "timely."

Moreover, where a defendant(s) refuses to acknowledge receipt of service of process, the Second Circuit held defendants "served," Morse v. Elmira Country Club, 752 F.2d 35, 40-41 (1984). Panel Judges, from this same Pipes Circuit, refused to apply the same Rules, and sanctions, to white

appellees, San Jose Airport Police, even upon their own confession that they were "effectively" served.

Since this Circuit upholds the 20-day requirement, Benny, 492, petitioner's basis upon which he filed his "Request for Entry of Default," should have been upheld, by the district court, and affirmed by the appellate court.

> When the guards filed no answer, a failure to make a timely answer to a properly served complaint will justify the entry of a default judgment.

Moreover, the rule that defendants timely submitted an answer on, November 7, 1988, (seven months after service of process), is clearly erroneous, nor can such a ruling find any support in the Federal Rule 12(a):

> Rule 12(a): Defenses and objections, When and how Presented - By Pleadings or Motions - Motion for Judgment or Pleadings
>
> (a) When Presented. A defendant shall serve his answer within 20 days after the service of the executed summons and complaint upon him, except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or Rule of Court of the State....

The district court's granting leave to file an answer is clearly erroneous. Petitioner does not

dispute that defendants filed an answer. Petitioner presents that defendants were lawfully prohibited from filing an answer where they are in default; Rule 55(a); Thomson, Benny and Morse, supra.

Respondents own admission, filed October 13, 1988, in their Opposition to Plaintiff's Opposition to Defendants' Motion to Dismiss/Motion for Summary Judgement, that "... proper service is deemed to have been effective...," endorses petitioner's several pleadings filed into the district court in oppisition to the court's rulings against him, and by which due process was denied petitioner.

The Circuit panel had before it appellant's Brief, pp. 5-11, in which petitioner presented these legal facts, corroborated by appropriate excerpts from the Record. The panel's refusal to give respectful credence to this Court's precedents, upon which petitioner relied, which are binding on the Circuit Court, is grounds for reversal of the panel's Memorandum. Refusal to acknowledge the mandates of Thomson, and Pope v.

United States, 323 U.S. 1 (1944); nil dicit, and pro confesso, infers contempt for precedent.

Because the circuit panel's Memorandum is opaque, and spurns the mandates of Thomson, and Pope, this Court's holdings, Carter v. Stanton, 405 U.S. 669 (1972), should be invoked:

> (T)the district court's order was opaque and unilluminating as to either the relevant facts or law with respect to the merits of plaintiff's claim, the Court vacated the order and remanded the case for further proceedings; ....

Where the Circuit panel's Memorndum fails to address the merits of the case, and fails to invoke the demands of the federal rules on the district court, this Court's protection of petitioner's lawful rights to due process should be invoked, therefor.

QUESTIONS PRESENTED - Evidence.

Petitioner proved with his evidence, (Excerpts 081, 131, 132) that he was fully qualified for the position offered by CSJ-SJAP, and met all the requirements of McDonald Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) as set forth in petitioner's appellant's Brief, p. 12 et seq. However, the failure of the district court to follow the

F.R.Civ.P., "in regular course," Thomson, 104-5, robbed petitioner of his guaranteed right to due process; i.e., default judgment should have been invoked as stated previously. The second denial of due process occurred when the district court ruled that petitioner was "unqualified" for the position of sworn law enforcement officer for SJAP, relying on Foster v. Arcata, 772 F.2d 1453, 1458 (CA9 1985), quoting:

> (T)he plaintiff in a Title VII action must show that 'he applied and was qualified for a job for which the employer was seeking applicant.' (McDonnell, 802). For the purposes of a motion for summary judgment, plaintiff must 'produce evidence sufficient to indicate a genuine factual dispute about whether (he) possessed the minimum qualifications for the job...,'

The panel Memorandum refuses to address the quantum force of petitioner's evidence which proves not only was he qualified, SJAP never produced into the record what "minimum qualifications (are required) for the job." (A-17)

The circuit panel's disposition of the facts of this case points to yet another misstatement, p.3, par.2:

> Banks was examined by Dr. Roberts, a

> clinical psychologist and also had a medical examination. He failed to pass that test and his name was removed from the eligible list because he had failed to meet department hiring standards.

Petitioner submits that this entire paragraph is totally false, pertaining to "failing to pass that test, and was removed from the eligible list." Petitioner took his medical examination on August 6, 1986; (A-20, infra).

The panel judges refuse to acknowledge the evidence filed which proves that CSJ-SJAP DISCONTINUED BANKS' BACKGROUND CHECK (mandatory for employment of a law enforcement officer) AS EARLY AS JULY 26, 1988, approximately three weeks BEFORE BANKS TOOK HIS MEDICAL EXAMINATION, AUGUST 6, 1988.

Panel judges also refuse to acknowledge the evidence which proves petitioner's allegations that CSJ-SJAP, on May 15, 1986 (3 months before this infamous medical exam), that Banks met all the hiring standards; (A-20, infra).

THERE IS NO EVIDENCE BEFORE ANY COURT WHICH STATES, PROVES, OR OTHERWISE PROVES THAT PETITIONER FAILED TO MEET ANY HIRING STANDARDS.

Panel Judges' Memorandum, p. 3, par.3, states:

> Banks appeal to the Civil Service Commission. A hearing was held and Dr. Roberts testified. He said that after conducting a psychological examination of Banks, he recommended against employment. His opinion was based on physical and emotional difficulties that Banks suffered while employed as a police officer in Palo Alto in 1982 through 1984.

Paragraph 3 clearly refutes the conclusions drawn in paragraph 2. Since defendants claimed plaintiff failed his medical, the medical doctor who examined plaintiff should have been required to testify at the Civil Service Commission hearing. Dr. Roberts appeared because it was Roberts' recommendations, not failing any "medical," that caused plaintiff's removal from the eligibility list, the contention-claim Banks' held-made consistently.

Roberts' testimony before the Civil Service Commission totally refutes defendants' pretextual claim that plaintiff failed his medical, taken, August 6, 1988.

The panel further refused to acknowledge evidence (Excerpt #081) which clearly refutes such a claim:

> This is to advise you that the Airport Security Police Department has withdrawn its action which caused the

> removal of your name from the eligible list for Airport Security Police Officer. (Emphasis added.)

This document is signed by, Frances A. Galloni, Director of Personnel. Her letter clearly states: "...that the Airport Security Police Department action that caused the (petitioner's) removal," NOT "failing the medical exam." Moreover, the lower court disregarded petitioner's prayer that defendants be required to explain what the airport police department's "action" was.

Par. 4, page 3. The Circuit Court states:

> For reasons which are unclear from the record Banks was reinstated to the eligible list but was advised that he would still have to complete his medical examination. He was told to arrange another test of his blood sugar or have his own doctor perform such a test. He failed or refused to have this done. (Emphasis added.)

It requires no special kind of legal training to discern as patently unjust for any party to lose his right to be accorded full understanding from the evidence s/he files in support of his/her claims-allegations. If the reasons are "unclear," then the matter should be remanded to the district court for clarity-explanation. Petitioner submits

that there is nothing "unclear" aboout the evidence he filed, and which evidence clearly proves defendants-respondents' guilt, as he charged.

Ruling on material issues before the court, and which issues, where jury trial is demanded, ought to have been presented for jury trial, and defendants' Motion for Summary Judgment denied, is yet another issue to be addressed, once the matter of default is settled by this Court.

The seminal issue here presented is that the Circuit Panel, admittedly found the Record "UNCLEAR," and saw no/unconscionable denial of due process to a black appellant who was denied by respondents by the most spurious means, and in retaliation for Banks' having filed a Title VII complaint when his former employers targeted him for his refusal to be harassed based on his race.

The panel has concluded that Banks was advised that he would still have to complete his medical examination. Yet, there is no evidence in the Records to that effect. A review of Excerpt #081, contains no information about completing a medical or retest.

To bolster the panel's denial of due process, it ruled that Banks "failed or refused to have a retest done." THIS IS TOTALLY FALSE. The fact is before Banks could be retested, he was removed from the eligibility list:

REMOVAL FROM ELIGIBILITY LIST - July 26, 1988.

MEDICAL EXAMINATION - August 6, 1988.

C O N C L U S I O N

Petitioner submits that this Court should grant certiorari here to rule, explicitly, on the lower courts' departures from the accepted and usual courses of judicial procedings-procedures, but which in this cause of action is in total conflict with applicable holdings of this Court.

For these reasons, and all the reasons set forth above, a writ of certiorari to the Ninth Circuit Court of Appeals should issue to review the Judgment-Opinion (Memorandum) of the Court of Appeals in this matter.

If this Court elects not to address the issues presented in this Petition at this time, petitioner requests that the Writ issue and that

CONCLUSION - cont'd

the matter be remanded to the Court of Appeals for the Ninth Circuit for redetermination in light of the lower court's disregard of petitioner's evidence filed in support-proof of his claims, the records being "unclear," as set out in detail above.

Respectfully submitted,

Harold C. Banks

Harold C. Banks,
Petitioner

DATED: August 31, 1991

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Harold C. Banks, Plaintiff-Appellant	No. 89-16612
v.	DC. N. CV-88-20250WAI
City of San Jose, City of San Jose Airport Police Department; Robert Ashley; Michael Roberts.	ORDER
Defendants-Appellees	

Before: WRIGHT, GOODWIN & SKOPIL, Circuit Judges

The petition for rehearing has been considered and is DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Harold C. Banks, Plaintiff-Appellant	No. 89-16612
v.	D.C.#CV88-20250 WAI
City of San Jose; City of San Jose Airport Police Department) Robert Ashley; Michael Roberts) Defendants-Appellees	MEMORANDUM*

Appeal from the United States District Court for the District of Northern California, William A. Ingram, Chief Judge, Presiding Submitted.**

Before: WRIGHT, GOODWIN & SKOPIL, Circuit Judges.

In this pro se appeal Banks argues that the district judge erred in dismissing a civil rights complaint against the City of San Jose, its airport police department, Police Chief Ashley and Michael Roberts, a psychologist. Banks alleged that he was wrongfully denied employment by the Airport Police Department because of his race.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed.R.

The action was dismissed and the motion of the defendants for summary judgment was granted. The action was dismissed as to Chief Ashley pursuant Federal Rule of Civil Procedure 4(j).

The other defendants assert that the notice of appeal was untimely. We disagree in view of the circumstances surrounding the earthquake in San Francisco in October 1989 which prevented Banks' notice of appeal from being timely filed.

Banks alleges that there was an abuse of discretion by the district court in denying his motion for default judgment. There was no error. Banks had failed to effect proper service on defendants. (A-16; supra, 3,4.)

To establish a prima facie case of racial discrimination under Title VII, a plaintiff must show that (1) he belongs to a racial minority; (2) he applied and was qualified for a job for which the employer was seeking applicants' (3) despite his qualifications, he was rejected; and (4) after his rejection the position remained open and the employer continued to seek applicants.

App.P. 34(a); Ninth Circuit Rule 34-4.

McDonnell-Douglass Corp. v. Green, 411 U.S. 792, 802 (1973).

A prima facie case of discrimination must be proved by a preponderance of the evidence. Once it has been established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision.

If the defendant meets that burden, the plaintiff must be afforded the opportunity to show that the employers' proffered rationale is pretextual and that its action was in fact motivated by impermissable discrimination.

The defendants point out that Banks was denied employment because he failed to pass the required medical examination and therefore failed to establish a prima facie case of racial discrimination. This, says Banks, was merely a pretext to deny him the position.

Banks was examined by Dr. Roberts, a clinical psychologist and also had a medical examination. He failed to pass that test and his name was removed from the eligible list because he failed to meet department hiring standards.

Banks appealed to the Civil Service Commission. A hearing was held and Dr. Roberts testified. He said that after conducting a psychological examination of Banks, he recommended against employment difficulties that Banks suffered while employed as a police officer in Palo Alto in 1982 through 1984. (Emphasis added.)

For reasons which are unclearfrom the record, Banks was reinstated to the eligible list but was advised that he would still have to complete his medical examination. He was to arrange another test of his blood sugar or have his own doctor perform such a test. He failed or refused to have this done. (Emphasis added.)

Banks has failed to present evidence sufficient to support an inference of intentional discrimination in his Title VII claim. For the same reason, the grant of summary judgment in favor of the defendants in the §1981 claim was not error. (Emphasis added.)

We find no merit in the other issues raised on this appeal. Banks' request for attorney fees is denied. He is not an attorney and has not

prevailed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Harold C. Banks, Plaintiff	NO.C-88-20250-WAI
v.	O R D E R
City of San Jose, et al., Defendants	

This Order responds to plaintiff's motion for a new trial and/or alternatively motion to alter or amend judgment filed July 27, 1989. The court construes plaintiff's motion as a motion for reconsideration of the Court's July 27, 1989 Order. This court entered an order granting summary judgment for defendants and denying plaintiff's cross-motion for summary judgment. The court duly considered the papers filed, the oral argument and the relevant law on the issues presented. IT IS HEREBY ORDERED THAT plaintiff's motion is DENIED.

DATED: 10 11 89

s/ _____
WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Harold C. Banks, Plaintiff v. City of San Jose, et al., Defendants	No.C-88-20250-WAI JUDGMENT

In accordance with the accompanying Order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action is DISMISSED.

DATED: 7 28 89

s/ _____
WILLIAM A. INGRAM
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Harold C. Banks, Plaintiff v. City of San Jose, et al., Defendants	No. C-88-20250-WAI O R D E R

In this Title VII action, plaintiff alleges that the City of San Jose failed to hire him for the position of Airport Security Police Officer for racially discriminatory reasons. Defendants City of San Jose and Dr. Michael Roberts' motion for summary judgment, and plaintiff's cross-motion for summary judgment, were duly noticed and heard on July 24, 1989.

After considering the papers filed by the parties, the argument presented at the hearing, and the tape of the Civil Service Commission hearing, IT IS HEREBY ORDERED THAT defendants' motion for summary judgment is GRANTED; and plaintiff's cross motion is Denied, for the reasons briefly noted below.

Defendants are entitled to summary judgment

because plaintiff cannot establish a prima facia case of discrimination. Under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the plaintiff in Title VII action must show that "he applied and was qualified for a job for which the employer was seeking applicants." For purposes of a motion for summary judgment, plaintiff must "Produce evidence sufficient to indicate a genuine factual dispute about whether (he) possed the minimum qualifications for the job...." Foster v. Arcata Associates, Inc., 772 F.2d 1453, 1458 (9th Cir. 1985).

San Jose Municipal Code §3.04.850 authorizes disqualification from eligible hiring lists due to "failure of the eligible to meet medical standards required to be met by applicants for employment...." The declaration of Dorothy Nielsen, a registered nurse in the Medical Services Division of the City of San Jose, states that on August 7, 1986, she reviewed plaintiff's blood work results and found his blood sugar level to be abnormal. Plaintiff does not dispute that (1) plaintiff was notified that his blood sugar level was abnormal; (2) that plaintiff was told by the city that he

could have his own doctor perform an additional medical test; and (3) that plaintiff never obtained the required additional blood work.

The court finds that there is no genuine factual dispute about whether plaintiff possess the minimum qualifications for the job. Plaintiff could not be hired by the City of San Jose without the additional medical testing. The court finds no contradictions in the medical test performed by the City of San Jose. In the absence of procuring additional medical testing, plaintiff is unable to show that he is qualified for the position of an Airport Security Police Officer.

Accordingly, defendants' motion for summary judgment is GRANTED; and plaintiff's cross-motion for summary judgment is DENIED.

Dated: 7 28 89

s/
WILLIAM A. INGRAM
United States District Judge

N.B.: Emphases supplied.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Harold C. Banks, Plaintiff, v. City of San Jose, et al., Defendants.	No. C-88-20250-WAI O R D E R

Plaintiff seeks damages against the defendants for alleged Title VII violations. On October 4, 1988, plaintiff moved this court to enter default judgment against defendants. On October 19, 1988, the court granted defendants twenty days in which to respond to the complaint. The defendants timely submitted an answer on November 7, 1988. A default judgment can be entered only if a party has failed to "plead or otherwise defend." Fed.R. Civ.P. 55(a). Since defendant has filed an answer plaintiff's motion for default is hereby DENIED.

DATED: 4 17 89

s/
WILLIAM A. INGRAM
United States District Judge.

N.B.: Emphases added.

Joan R. Gallo, City Attorney
Andrea B. Ferguson, Dep.
City Attorney
151 W. Mission St.
San Jose CA 95110
408/277-4924
Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Harold C. Banks,
Plaintiff

NO. C-88-20250-WAI

SECOND PROPOSED ORDER

v.

City of San Jose, et al
Defendants

Defendants have moved for dismissal of the action herein pursuant to Rule 4(j) of the Federal Rules of Civil Procedure.

Satisfactory proof having been made and good cause appearing therefore(sic).

IT IS HEREBY ORDERED that the Motion of defendants be, and hereby is, granted as to defendant Robert Ashley, and that the action herein be dismissed without prejudice as to that defendant.

IT IS FURTHER ORDERED in recognition that plaintiff is in propria persona and in the interest of judicial economy, that proper service is deemed to have been effective as to the remaining

defendants and those defendants are ordered to file a responsive pleading in this matter within twenty (20) days from the date of this order.

Dated: October 18, 1988

s/_____
The Honorable William A. Ingram
United States District Judge

N.B.: Emphases are added.

Harold C. Banks
10 Flaum Court
Sacramento CA 95823
916/393-2201

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Harold C. Banks, Plaintiff-Appellant	No. 89-16612 (DC No. C-88-2-250WAI)
v.	Plaintiff-Appellant's
City of San Jose, et al., Defendants-Appellees	PETITION FOR REHEARING F.R.A.P., Rule 40(a)

I. JURISDICTION.

Now comes plaintiff-appellant, Harold C. Banks, pursuant to F.R.A.P., Rule 40(a), and files his petition for rehearing.

Appellant, at the outset, submits that his petition does not just merely reargue the case; but is filed in opposition to this Court's NOTICE OF ENTRY OF JUDGMENT, and to direct this Court's attention to the following legal situations that exist:

A. Numerous material points of fact and law are overlooked in the decision.

B. An apparent conflict with another decision of the court which was not addressed in the Opinion.

This appeal was submitted for review before panel Judges Wright, Goodwin, and Skopil, Circuit Judges. This Court rendered its decision on February 21, 1991, in the form of a three(3) page memorandum, basing its decision on five (5) drawn general conclusions:

1. Banks had failed to effect proper service of process on defendants.
2. Banks failed to pass "that test" (unidentified by the Circuit panel), and was removed from the eligible list because he failed to meet department hiring standards(,) (nowhere submitted into evidence.)
3. Banks was advised that he would still have to complete his medical examination.
4. Banks was told to arrange another test of his blood sugar or have his own doctor perform such a test.
5. Banks has failed to present evidence sufficient to support an inference of intentional discrimination in his Title VII claim.

To come to such general conclusions, this Court gave unlawful weight to defendants' unsubstanti-

ated claims and assertions, and totally disregarded the factual documents of evidence. Appellant submits that this Court has erred. He also submits this Petition in order to redirect this Court's attention to that documented evidence, and to the numerous legal situations that exist in this case as follows:

A. ITEM #(1). BANKS HAD FAILED TO EFFECT PROPER SERVICE ON DEFENDANTS.

In reference to service of process, appellant submits that there exists a factual conflict with another (appellate) decision which was not addressed in the Opinion.*

1. FACT OVERLOOKED: The district court, in its order ... October 19, 1988, (Attach.A, Exc. #022), deemed plaintiff's service of process to be properly served. However, the district court failed to answer plaintiff's submitted Request of Entry of default (Attach.B, Ex. #016).

2. Also, defendants, in their own pleadings October 13, 1988, stipulated to the district court that plaintiff's service was proper.

*Supra, p. 11, pars.2,3; Benny, LeMaster; Morse; Thomson.

The district court accepted defendants' stipulation, and issued its Order on October 19, 1988 (Attach. A, Exc. #022)

B. ITEM #(2). Banks failed to pass the medical; failed to meet department hiring standards.

In reference to qualifications, appellant submits the material points of fact or law overlooked in the decision are:

1. FACT OVERLOOKED: This Court overlooked and disregarded plaintiff's SUBMITTED FACTUAL DOCUMENTS OF EVIDENCE (Attach. C&D, Exc. #131, 132).

Attachment C, is defendants' own notification to plaintiff, notifying him that he had passed all phases of the examination process and (was) placed on the open eligible list for Airport Security Police, with final score of 87.10%.*

THIS DOCUMENT REFUTES DEFENDANTS' CLAIM.

ATTACHMENT D, is defendants' own notification to plaintiff, notifying him that he had been certified as being eligible for appointment to Airport Security Police.** This document refutes

*Compare, supra, A-5,(par.2).

**Compare, supra, p.6,(pars.1,2); p.8,(pars. 1-3,incl.)

defendants' claim.

C. ITEM #(3). "Banks...was advised that he would still have to complete his medical examination ...."(*)

Appellant submits that this Court has reviewed no evidence submitted by defendants that show Banks failed to pass his medical exam. Instead of relying on a preponderance of the evidence, This Court relied on defendants' unsubstantiated claims and assertions. Appellant directs this Court's attention to the following facts:

1. FACT OVERLOOKED: That plaintiff was examined by Dr. Roberts, (a clinical psychologist), and also examined by a medical doctor(**) in Medical Services. These are two separate examinations, with the exam by Dr. Roberts occurring in May 1986, with the exam through Medical Services occuring on August 6, 1986.(***) This Court reviewed no evidence, no medical reports or documents from

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(*) Compare, supra, p.4,par.3, with pp.15, par.4, p.16-17,18; p.19.

(**) Internist, versus "clinical psychologist."

(***) Compare, supra, p.16,17,(pars.1-2),with A-5,par.1, which issues are in appeal currently.

Medical Services that support defendants' claim that Banks failed his medical exam.

2. FACT OVERLOOKED: Defendants claim Banks failed his "Medical Exam"; yet, during Banks' Civil Service Commission hearing, Dr. Roberts, appeared on behalf of defendants, but no one from Medical Services. This fact above refutes defendants' claim that Banks failed his medical.

3. FACT OVERLOOKED: During Banks' civil service appeal, Dr. Roberts testified that after conducting a psychological (not medical) examination of Banks, he recommended against employment. His opinion was based on physical and emotional difficulties that Banks suffered while employed as a Police Officer in Palo Alto in 1982-1984.(*)

D. ITEM #(4). Banks was told to arrange another test of his blood sugar.

For Section (d) above, appellant submits the same facts submitted in Section (c) above.

(*) Compare, supra, A-9,(1),(2),A-10,with p.20, A-5,par.2.

E. ITEM #(5). Banks failed to present evidence sufficient to support an inference of intentional discrimination in his Title VII claim.

Appellant submits that this Court's conclusion and statement here is false and in error. Appellant also directs this Court's attention to the following material points of fact or law overlooked in the decision. They are:

1. FACT OVERLOOKED: That this court, by its own acknowledgment, determined that the records are unclear; yet, in total disregard for the unclear records, this Court rendered its deicison anyway. The Court's action is biased in favor of defendants, and denied appellant's due process.

Also, in additon to this Court's disregard of the unclear records, this Court failed to answer appellant's motion request for oral argument. Had this Court seen fit to answer appellant's request for oral argument, and grant same, appellant could have explained the "unclear records."

2. FACT OVERLOOKED: Defendants based their total alleged evidence on the declaration of Nurse Dorothy A. Nielsen (see Attach.G, EXC.#110, l. 15-20). The following facts were not consid-

ered in the decision.

a) Nielsen, nor the defendants, did not produce any evidence that showed she analyzed Banks' blood work.

b) Nielsen, nor defedants, did not submit any evidence that showed a blood sugar level of 123 was violative of defendants' hiring standards;(*) (See Attach. H, EXC. #032, l. 17-26).

c) Nielsen, nor defendants, did not submit any evidence that showed Banks' employment application was placed on medical hold.

4. FACT OVERLOOKED: This Court totally disregarded appellant's submitted evidence that plainly shows that Banks was denied employment and removed as an applicant, several months before the date of his medical, (Attach. I, & J, Exc. #106, #133). Both Attachments totally refute defendants' claim.(**)

5. FACT OVERLOOKED: This Court totally disregarded appellant's submitted evidence, (Attach.F, EXC. #081), that plainly refutes defendants' claim

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(*) Compare, supra, A-9; A-10,par.1,(3), par.2; A-4,par.5, with, p.15, pars.2,3, p.16.

(**) Supra, p.20.

that Banks failed his medical. Attach. F, defendants' letter of reinstatement, defendants state that it was the Airport's Security Police Department's action that caused the removal of Banks from the eligible list. Attach. F, totally refutes defendants' claim.

S U M M A R Y

Appellant submits that, notwithstanding the overwhelming evidence, this Court, in its ruling made several critial errors. They are:

1. Allowing defendants to prevail on "mere" claims and assertions, and ignoring the fact that defendants submitted no evidence;
2. By disregarding appellant's submitted evidence;
3. By ruling on matters and disregarding the fact that the records were "unclear."

CONCLUSION

While in the United States District Court, said lower court established a pattern and practice of not answering Plaintiff's pleadings, being delinquent in notifying plaintiff, disregarding plaintiff's evidence, disregarding the federal rules, and displayed bias in favor of white defendants

in its review and opinions of the case matters.

Appellant also submits, with chilling realism, that this Court of Appeals has continued the pattern and practice established by the district court. In every aspect of this Court's judgment, the panel judges have accepted defendants' mere claims or assertions, and have totally disregarded appellant's submitted evidence that clearly refutes defendants' claims. The records filed before this Court, in the following different categories also totally corroborate appellant's claim. The categories are:

1. Dr. Roberts' testimony before the Civil Service Commission;
2. Defendant's reinstatement of Banks;
3. The Airport Security Police Departments' action which caused the removal of Banks.

In reference to Dr. Roberts' testimony, this court acknowledged the fact that Dr. Roberts testified before the Civil Service Commission that he recommended against Banks' employment, and that his opinion was based on emotional difficulties Banks suffered as a police officer for Palo Alto in 1982-84. Roberts' testimony, alone,

totally refutes defendants' claim; yet, this Court totally disregarded this factual evidence; thus, denying Banks due process.

In reference to defendants' reinstatement of Banks, this Court's errors are threefold: 1) This court stated the records were "unclear," yet the panel judges ruled anyway; 2) This Court totally disregarded the fact that defendants reinstated Banks, and 3) This Court disregarded the most critical and most obvious question, "If Banks failed his medical and was unqualified, "why" did defendants reinstate Banks?" Defendants' reinstatement of Banks totally refutes their claim.

In reference to the Airport Security Police Department's action, defendants clearly stated in their letter, dated, November 5, 1986 (Exc. #081), that it was the Airport Security Police Department's "action" which caused Banks' removal, (not his failing his medical). This exhibit of evidence totally contradicts and refutes defendants' claims; yet, this Court totally disregarded this factual evidence.

At this point, since the panel judges have ruled on the matter, appellant asked Judges Wright, Goodwin, and Skopil, "What is the Airport Security Police Department's "action" which daused Banks' removal?"

Wherefore, due to all the above, appellant calls upon this Court to act lawfully to grant appellant's prayers for relief.

Respectfully submitted,

s/Harold C. Banks
In propria persona

Date: April 12, 1991.

PROOF OF SERVICE OF PROCESS

I, M. Thora Worrell, DECLARE AS FOLLOWS:

I reside in the State of California, resident of Alameda County. I am over the age of eighteen years, and am not a party ot this action. On, October 1, 1991, I served the within document:

"Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals, w/Service of Process,"

on the parties herein named, by placing the required number of copies in each package addressed to the parties below, and offered them to the U.S. Postal person to affix first-class postage, with Return Receipt Request(*), where indicated below, in Fremont, California.

*Clerk, U.S. Supreme Court (40+2 copies)
One First Street, N.E.
Washington, D.C. 20543

Attorney for Respondent (3 copies)
Ms. Joan Gallo
City Attorney's Office
151 W. Mission Street
San Jose, CA 95110

I declare under penalty of perjury the foregoing is true and correct.

Signed: M. Thora Worrell
M. Thora Worrell